*UNITED STATES DISTRICT COURT*

*DISTRICT OF MAINE*

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| ***DAVID GORDON FLEMING,*** | ***)*** | |
| | ***)*** | |
| ***Petitioner*** | ***)*** | |
| | ***)*** | |
| ***v.*** | ***)*** | ***Docket No. 01-239-B*** |
| | ***)*** | |
| ***JEFFREY MERRILL, WARDEN,*** | ***)*** | |
| ***MAINE STATE PRISON,*** | ***)*** | |
| | ***)*** | |
| ***Respondent*** | ***)*** | |

***RECOMMENDED DECISION ON PETITION FOR WRIT OF HABEAS CORPUS AND MEMORANDUM DECISION ON MOTION REQUESTING COURT ORDER***

The petitioner seeks a writ of habeas corpus pursuant to 28 U.S.C. § 2254 in connection with his conviction after a jury trial in the Maine Superior Court (Penobscot County) on a charge of murder in violation of 17-A M.R.S.A. § 201(1)(A). Also pending is a motion seeking "unobstructed access to the court." Docket No. 3. I recommend that the petition be dismissed and I deny the motion.

**I. Background**

On the petitioner's direct appeal from his conviction, the Maine Law Court summarized the the facts presented at trial as follows:

> On October 26, 1990, at 8:00 p.m., Fleming left his home in Bucksport and drove to Bangor. He went to the Club Roxy, located a few blocks away from the Green Gables convenience store where [Lisa] Garland worked. Fleming left the Club Roxy after receiving directions to another bar at approximately 11:30 p.m.
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> On October 26, Garland was working at the convenience store from late afternoon until closing at 1:00 a.m. She left the store after closing and proceeded to her home located nearby. At 1:30 a.m., Kitty Everett, a close friend, went looking for Garland at her apartment and discovered the apartment door open, a plant knocked over, Garland's open purse on the

counter, and an open soda can. Garland was not at the apartment and was not seen alive again.

Fleming returned to the home he shared with his girlfriend in Bucksport at approximately 3:00 a.m. Fleming did not sleep soundly, awoke at 5:00 a.m. and left in his girlfriend's vehicle. At approximately 6:20 a.m., Fleming, while driving her car, accelerated, veered off the road and crashed head-on into the front of a parked tractor-trailer. Fleming survived the crash, but he was hospitalized for fifteen days.

On November 30, 1990, an equipment operator found Garland's body lying face down in a gravel pit in Alton. An autopsy revealed that Garland had been raped and died of a skull fracture after being struck by a blunt instrument. The medical examiner was unable to precisely determine the date of Garland's death but testified that there was nothing to indicate that she had not died five weeks before the autopsy. During the autopsy, the medical examiner gathered evidence that included carpet fibers from Garland's socks, a vaginal swab, a vaginal smear, and a whole blood sample. The State Police sent the evidence to the Federal Bureau of Investigation (FBI) for analysis when tests conducted on the vaginal swab and smear revealed the presence of intact sperm cells.

After the discovery of Garland's body, the policy questioned and considered a number of suspects. In July of 1991, the police were alerted to Fleming's possible involvement in Garland's homicide based on an unrelated crime in Cape Neddick. During the investigation into the Cape Neddick crime, the police seized many pieces of white pine from the trunk of Fleming's vehicle, and obtained a blood sample from Fleming for DNA analysis.

A distinctive wood chip had been found among the debris in the body bag used for Garland's body. At the trial, Richard Jagels, a professor at the University of Maine, testified that the wood chip was consistent with the white pine found later in the trunk of Fleming's car and inconsistent with the types of wood otherwise present at the crime scene. Wayne Oakes, a supervisory special agent with the FBI, testified that the fibers taken from Garland's socks matched those from the carpet swatch of Fleming's car.

Michael Vick, a DNA analyst at the FBI laboratory, testified that restriction fragment length polymorphism ("RFLP") DNA testing demonstrated that DNA bands from Fleming's whole blood sample matched the DNA bands from the male portion of Lisa Garland's vaginal swab on three of the four probes tested. The fourth probe was declared uninterpretable. Over Fleming's objection, Vick testified that the chances of someone other than Fleming matching the bands from the swab on three probes was 1 in 500,000. Vick testified that the FBI estimates the frequency of DNA patterns by using the product rule. He also testified that, estimating the frequency of DNA patterns pursuant to the "ceiling principle," the chance of someone other than Fleming matching the bands from the swab was 1 in 35,760.

> Laurence Mueller, an associate professor in population genetics at the University of California-Irvine, testified that the FBI's application of the product rule to Caucasians is wrong. Mueller testified that a better method of determining the frequency of DNA patterns is through the use of the ceiling principle or the counting method. Using the ceiling principle, Mueller testified that the chance of someone other than Fleming matching the bands from the swab was 1 in 140, and using the "counting method," 1 in 1,710.

*State v. Fleming*, 698 A.2d 503, 505-06 (Me. 1997) (footnotes omitted). The petitioner was convicted by a jury of causing the death of Garland. *Id*. at 504.

On June 16, 1995 the petitioner filed a motion for a new trial which he withdrew on October 2, 1995 after a testimonial hearing. Docket Sheet, *State of Maine v. David Gordon Fleming*, Maine Superior Court (Penobscot County), Docket No. CR-93-144 ("State Criminal Proceeding") ("Criminal Docket Sheet") at 24, 26. He then took an appeal to the Maine Law Court in which he contended, *inter alia*, that the DNA techniques used by the expert witnesses at trial had not been sufficiently accepted in the relevant scientific community to be admissible under the Maine Rules of Evidence and that the trial court erred by admitting testimony relating to prior DNA testing of his blood. *State v. Fleming*, 698 A.2d at 504. The appeal was denied. *Id*. at 505. His petition to the United States Supreme Court for a writ of certiorari was denied on January 12, 1998. *Fleming v. Maine*, 522 U.S. 1063 (1998).

On August 4, 1997 the petitioner filed a *pro se* petition for post-conviction review in the Maine Superior Court. Docket Sheet, *David Gordon Fleming v. State of Maine*, Maine Superior Court (Penobscot County), Docket No. CR-97-597 ("State Post-Conviction Proceeding"), at 1. Five lawyers were appointed in succession to represent him. *Id*. at 1-5. After a two-day hearing, *id*. at [8], the court denied the petition, *id*. at [9]. The following issues were raised in the state-court petition, as amended: (i) contact by a prison guard with a juror, failure of the state to provide all required discovery, excessive sentence and illegal use of evidence from a prior conviction; and (ii) ineffective

assistance of counsel in the following specific ways: (a) failure to impeach certain witnesses, failure to cross-examine a particular witness by using her prior written statement and failure to consult with the petitioner; (b) failure to object and allowing harmful evidence to be presented as a result of the assertion of a particular defense; (c) failure to object to the prosecution's closing argument, failure to call certain witnesses, failure to properly investigate, preventing the petitioner from testifying and supporting the imposition of a life sentence; (d) failure to raise an alternative suspect defense; (e) failure to object to blood sample evidence on grounds of chain of custody and handling; (f) failure to challenge the theory and techniques of DNA profiling; (g) failure to call witnesses requested by the petitioner; (h) failure to request "proper" jury instructions; (i) failure to adequately investigate and research grounds for the motion for a new trial; and (j) failure to raise all viable issues in the appeal to the Law Court. Petition for Post-Conviction Review, State Post-Conviction Proceeding ("State *Pro Se* Petition"), at 3-4; Amended Petition for Post-Conviction Review, *id*., at 1-2. The petitioner filed a *pro se* notice of appeal from the denial of his petition. Docket Sheet at [10]. The Law Court issued an order denying a certificate of probable cause to proceed with the appeal. Order Denying Certificate of Probable Cause [dated January 8, 2001], *David Gordon Fleming v. State of Maine*, Maine Supreme Judicial Court sitting as the Law Court, Docket No. Pen-00-323.

The *pro se* petition initiating the instant action was filed in this court on December 3, 2001. Docket No. 1.

## II. Discussion

The petitioner raises the following five issues in this action: (i) alleged ineffective assistance of counsel, specifically in the alleged failure to (a) investigate possible defenses, obtain and present

expert testimony or to present an argument, supported by evidence, against a life sentence; (b) impeach witnesses Raymond Taylor, Maryann (Kitty) Everett, Sammy Everett and Lisa Hunt; (c) prepare for cross-examination of the state's expert witnesses, the sentencing hearing and the motion for a new trial; (d) allow the petitioner to testify; and (e) prevent the admission of evidence of prior bad acts; (ii) alleged prosecutorial misconduct in withholding and destroying exculpatory evidence and instructing witnesses in how to testify; (iii) interference by the state in attorney-client communication; (iv) denial of a motion for change of venue; and (v) insufficient evidence to support the conviction. Brief in Support of Writ of Habeas Corpus USC § 2254 ("Petition") (Docket No. 5) at 3-17. The petitioner has also filed a document entitled "Motion Requesting Court Order to Allow Petitioner Unobstructed Access to the Court" (Docket No. 3) to which the respondent was ordered to reply. Order (Docket No. 4) at 1. The respondent has filed an "answer" to the petition, Docket No. 12, and an objection to the motion, Docket No. 13. I will address these matters separately.

**A. The Habeas Petition**

*1. Procedural Default.* The respondent contends that the following claims asserted in the petition have been procedurally defaulted and may not be considered by this court: ineffective assistance of counsel in the cross-examination of the state's expert witnesses due to stuttering and repetition (Petition at 5), prosecutorial misconduct (Petition at 10-12) and interference with attorney-client communication (Petition at 13). Respondent's Answer to Petition for Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2254 ("Response") (Docket No. 12) at 9, 10-13. In response, the petitioner withdraws the issue concerning stuttering and repetition on cross-examination. Untitled Document (Docket No. 17) at 1. Accordingly, that claim will not be considered further.

The statute governing the relief sought by the petitioner provides, in relevant part:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that —
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> **(A)** the applicant has exhausted the remedies available in the courts of the State; or
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> **(B)(i)** there is an absence of available State corrective process; or
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> **(ii)** circumstances exist that render such process ineffective to protect the rights of the applicant.

28 U.S.C. § 2254(b)(1). Here, there is no suggestion in the record that the state has not made corrective process available to this petitioner or that the available process is ineffective to protect his rights.

> In recognition of the state courts' important role in protecting constitutional rights, the exhaustion principle holds, in general, that a federal court will not entertain an application for habeas relief unless the petitioner first has fully exhausted his state remedies in respect to each and every claim contained within the application.

*Adelson v. DiPaola*, 131 F.3d 259, 261 (1st Cir. 1997). "[A] habeas petitioner bears a heavy burden to show that he fairly and recognizably presented to the state courts the factual and legal bases of [his] federal claim[s]." *Id*. at 262.

In this case, it is clear that the petitioner did not present to the Maine courts either on direct appeal or in his petition for post-conviction review the claim presented here to the effect that the prosecution improperly coached the testimony of witnesses. Accordingly, that claim has not been exhausted and may not be addressed by this court. Ordinarily, the presence of both unexhausted and exhausted claims in a petition for relief under section 2254 requires the federal court to dismiss the entire petition. *Rose v. Lundy*, 455 U.S. 509, 510 (1982). However, the respondent in this case does not seek dismissal on this basis.[1] He merely invokes the doctrine of procedural default with respect to this claim and others which will be discussed below. A procedural default in state court acts as an

[1] *See Verner v. Reno*, 166 F.3d 350 (table), 1998 WL 792059 (10th Cir. Nov. 3, 1998), at **2 (government's failure to raise rule requiring dismissal of mixed petitions means that court will address merits of exhausted claims).

adequate and independent state ground and immunizes a state court decision based on that default from habeas review in federal court. *Carsetti v. State of Maine*, 932 F.2d 1007, 1009 (1st Cir. 1991). While there is no state court decision on the defaulted claim in this case, the outcome of any attempt by the petitioner to raise it at this time is clear; the state courts would hold that the claim is procedurally barred by operation of 15 M.R.S.A. § 2183(3), which requires that all grounds for relief from a criminal judgment or post-sentencing proceeding be raised in a single post-conviction review action and provides that all grounds not so raised are waived. That is sufficient to allow application of the procedural-default doctrine. *Carsetti*, 932 F.2d at 1010-11. The petitioner has made no attempt to demonstrate both the cause for the procedural default and the prejudice to his case that is required to avoid application of the procedural-default doctrine, *Wainwright v. Sykes*, 433 U.S. 72, 87 (1977), and accordingly this court will not consider any unexhausted claims for this reason as well. *See generally Burks v. Dubois*, 55 F.3d 712, 716-17 (1st Cir. 1995).

With respect to the other claims which the respondent contends are procedurally defaulted, the petitioner correctly points out, Petitioner's Reply to Respondent's "Answer" ("Reply") (Docket No. 21) at 2-3, that he raised these claims in his *pro se* request to the Law Court for a certificate of probable cause to appeal from the Maine Superior Court's denial of his petition for post-conviction review, Memorandum: M.R.Crim.P. 76 Requesting Certificate of Probable Cause, attached to Reply, at 22-28. However, raising an issue for the first time in this fashion is not sufficient under Maine law to avoid application of the procedural-default doctrine. A claim raised for the first time in an appeal from the denial of post-conviction relief will not be considered by the Law Court. *Younie v. State*, 281 A.2d 446, 448-49 (Me. 1971). Raising a claim for the first time in a request for a certificate of probable cause to appeal from the denial of post-conviction relief is a procedural default under Maine law.

In this case, the petitioner's claims of prosecutorial failure to provide exculpatory evidence were actually presented to the state court before the request for a certificate of probable cause was submitted, but that fact does not change the outcome here. Specifically, the petitioner alleges that the state failed to provide him with "1) a four page report from the F.B.I. about the examination of blood found in the car; 2) written statements from a witness Teresa Belle Dawn concerning a [sic] alternative suspect; [and] 3) the lost [sic] of evidence (bugs) which could have and would have been able to establish the time of death." Petition at 10. In his *pro se* petition in state court, the petitioner alleged that "state failed to properly supply all discovery of evidence." State *Pro Se* Petition at 3. A bill of particulars submitted by counsel for the petitioner in the state post-conviction review proceeding made specific mention of the first and third arguments now presented in this proceeding. Petitioner's Bill of Particulars and Opposition to State's Motion to Dismiss ("Bill of Particulars"), State Post-Conviction Proceeding, at 12-13. However, these issues were not mentioned in the petitioner's post-hearing brief, Petitioner's Memorandum of Law, State Post-Conviction Proceeding, at 6-13 (section of brief entitled "Argument"), and accordingly must be deemed to have been waived.[2] This is another procedural default under Maine law. Maine statutory law provides another ground for procedural default of these claims.

> Errors at the trial which have been or could have been raised on a direct appeal, whether or not such an appeal was taken, may not be raised in an action for post-conviction review under this chapter; provided that if the failure of the convicted or adjudicated person to take an appeal or to raise certain issues on appeal is excusable and the errors not appealed may result in reversal of the criminal judgment, the court may order than an appeal be taken as provided in section 2130.

15 M.R.S.A. § 2128(1). Each of these allegations of prosecutorial misconduct could have been raised on the petitioner's direct appeal from his conviction and were not. He offers no reason why this court,

[2] The judge who presided at the evidentiary hearing on the post-conviction review petition in state court declined to address theories (*continued on next page*)

or any state court, should find that the failure to raise these issues at that time was excusable. Accordingly, these issues are procedurally defaulted for this reason as well.

With respect to the claim concerning the failure to provide the petitioner with statements from Teresa Belle Dawn about an alternative suspect, the petitioner raised this issue in his motion for a new trial, which he subsequently withdrew. Motion for New Trial, State Criminal Proceeding, at 1-2. Under M. R. Crim. P. 33, a motion for a new trial based on the ground of newly discovered evidence must be made within two years after entry of judgment in the criminal docket. Judgment was entered against the petitioner in the underlying criminal case on June 2, 1995. Criminal Docket Sheet at 24. The two-year period expired in 1997. Because the petitioner could have pursued this issue before the state courts and failed to do so in a timely fashion, it has been procedurally defaulted and may not be considered here.

The claim concerning interference with attorney-client communications was presented by the petitioner to the state post-conviction review court, Bill of Particulars at 13-14, but was not mentioned in his post-hearing brief and must be considered waived for the reasons discussed above. That claim has also been procedurally defaulted.

*2. The remaining claims*. The subsection of the federal statute applicable to these claims provides:

> **(d)** An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim —
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> **(1)** resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
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> **(2)** resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.
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> **(e)(1)** In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a

not discussed in the petitioner's post-hearing brief. Amended Decision and Judgment, State Post-Conviction Proceeding, at 7.

> determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.
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> **(2)** If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that —
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> **(A)** the claim relies on —
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> **(i)** a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
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> **(ii)** a factual predicate that could not have been previously discovered through the exercise of due diligence; and
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> **(B)** the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

28 U.S.C. § 2254(d)-(e).

Claims of constitutionally defective assistance of counsel are governed by the standards established by the Supreme Court in *Strickland v. Washington*, 466 U.S. 668 (1984). First, the petitioner must show that his counsel's performance was deficient, *i.e.*, that the attorney "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id*. at 687. Second, the petitioner must make a showing of prejudice, *i.e.*, "that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id*. The court need not consider the two elements in any particular order; failure to establish either element means that the petitioner is not entitled to relief. *Id*.

*i. First Ground*

The petitioner's first allegation concerning his claim of constitutionally ineffective assistance of counsel states as follows, in its entirety:

> Trial counsel failed to investigate and discover objective, compelling, exculpatory evidence to impeach state's expert witnesses. At the post conviction review hearing trial counsel testified that his reason for not having rebuttal experts was because the court refused to provide funds. Upon review of the trial docket sheet this assertion is beyond doubt a lie. No motion's [sic] for such funds were requested, any motion's [sic] for funds

> were granted. Trial counsel when asked about investigating witnesses stated he had fully investigated and talked to each witness. This was yet another lie, when prison guard Mr. Kennth [sic] Virgue took the stand he stated that counselor never talked to him, and then upon hearing for a new trial again because of counsel's failure to talk to the witnesses a pro-se motion to withdraw the motion needed to be made. Then to top everything off upon the sentencing proceeding there was no defense, no investigation or preparation to agrue [sic] against the imposition of a life sentence, no psychiatric or psychological evaluation, no character witnesses to dispute the life sentence.

Petition at 3-4. The judge who presided over the post-conviction review hearing[3] dealt with these claims in the following manner:

> Fleming first asserts that [his trial counsel] failed to present evidence of mitigating factors at the sentencing hearing, in violation of requirements set forth in *State v. Shortsleeves*, 580 A.2d 145 (Me. 1990). In *Shortsleeves*, the Law Court reiterated the principle stated in *State v. Anderson and Sabatino*, Nos. 78-37, 78-40 (Me. App. Div. June 30, 1980), that a life sentence is never justified unless accompanied by aggravating circumstances. At least two such aggravating circumstances cited in *Shortsleeves* were present in this case — the sexual abuse of the victim and Fleming's prior conviction for the 1991 attempted murder in Cape Neddick.
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> The *Shortsleeves* case also established that the court must consider other mitigating circumstances that would require a sentence lesser [sic] than life imprisonment. *See Shortsleeves*, 580 A.2d at 150. The court there "found the defendant's youth and above-average intelligence to be mitigating factors, but their effect was diminished due to his already long criminal record. *See id*. at 150-51. Fleming does not demonstrate that any such mitigating circumstances existed in his case that would compel a sentence lesser [sic] than life imprisonment. Contrary to Petitioner's contentions, *Shortsleeves* does not require the defense attorney to seek a psychological evaluation of the defendant. Notably, the Law Court in *Shortsleeves* upheld the defendant's life sentence regardless of "a 'truly devastating' report of a psychologist who spent several hours with [the defendant]." *Id*. In this case, the complete lack of mitigating circumstances and the existence of at least two aggravating factors supports the life sentence imposed on Fleming.
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> * * *

[3] The petitioner focuses his argument concerning application of the section 2254 standard on the denial by the Law Court of a certificate of probable cause to appeal. Petition at 2; Explanation of Exhibits and Clarification (Docket No. 6) at 1; Reply at 2-6. By denying the petitioner such a certificate, the Law Court did not itself act on the merits of the petitioner's claims; it merely made final the decision of the Superior Court. It is the decision of the Superior Court justice who presided at the post-conviction review hearing that is at issue in this proceeding.

> Fleming also contends that he received ineffective assistance of counsel based on [his trial counsel's] failure to obtain expert testimony with regard to the DNA evidence, the carpet fibers, and the wood chips. An attorney's trial strategy, which includes who to call as witnesses and what questions to ask witnesses, is reviewed "to determine whether such strategy was manifestly unreasonable, that is, a strategy which resulted in a loss of a substantial ground of defense." *Pierce [v. State]*, 463 A.2d [756, ] 759-60 [Me. 1983]. "To show prejudice from the failure to interview a witness, however, the petitioner must demonstrate both the witness's availability for trial and the nature of the witness's testimony." *[State v.] Jurek*, 594 A.2d [553,] 555 [Me. 1991]. Fleming has not demonstrated either of these factors for any expert witness. Further, Fleming has not asserted any "substantial ground of defense" of which he was deprived because of [his trial counsel's] failure to call expert witnesses. The record in fact reveals that [his trial counsel] effectively cross-examined the State's expert witnesses, thereby reducing the damaging effect of the testimony upon Fleming's defense.

Amended Decision and Judgment, State Post-Conviction Proceeding, at 3-5.[4]

These conclusions are not contrary to, nor do they involve an unreasonable application of, clearly established federal law. Indeed, federal law also requires a prisoner seeking post-conviction relief on the basis of such claims to identify the witnesses allegedly not called and to set forth their expected testimony. *E.g., Saunders v. United States*, 236 F.3d 950, 952 (8th Cir. 2001). A mere assertion that such witnesses exist and that their testimony would be "objective, compelling [and] exculpatory" is not sufficient. Given this gap in the petitioner's presentation, the question whether the state court would have made funds available for expert witnesses or psychological evaluation is irrelevant.

With respect to the sentencing hearing, the petitioner does present "statements" of four potential "character" witnesses. Explanation of Exhibits and Clarification at [11]; Exhibits attached to excerpt from transcript of sentencing in materials submitted by petitioner. The exhibits are a police

[4] Footnote 2 to the court's written opinion states: "Fleming briefly alleges ineffectiveness by [trial counsel] because at the sentencing hearing he did not call any character witnesses or argue against life imprisonment. This court does not address these issues because Fleming fails to name any character witnesses available to testify on his behalf, and he does not cite any arguments that [trial counsel] could have raised against a life sentence." Amended Decision and Judgment, State Post-Conviction Proceeding, at 4 n.2.

report of an interview with the petitioner's former employer and transcripts of police interviews with three individuals. The employer is reported to have said that the petitioner "was a very good worker." Bangor Police Dept. Supp. PBD#3 COMP… # 90-46870, Shawn Kimball. Penny Jo Taylor, who said that she "[didn't] know [the petitioner] very well," also said that "he's . . . always been nice and gives you the shirt of [sic] your back. . . . [H]e was coming up every day with you know wood and chopping the wood and carrying it in for me and if I needed a ride to the store and . . ." Taped Interview with: Penny Taylor at 1. John Whitney, who apparently lived in the same building as the petitioner, said that he "seemed very calm, cool and collected and he treated me and my wife very nicely." Taped Interview with: John Whitney at 1. Nicole Hodgdon, who said that she and the petitioner "were just friends that happened to sleep together from time to time" also said that the petitioner "was nothing but sweet to me. He was always he . . . he basically would do anything for you. He was always really really super nice so I had no reason to doubt him on anything." Taped Interview with: Nichole Hodgdon at [2], [5]. The fact that these individuals thought that the petitioner was a good worker or a nice person has no bearing on the length of the sentence to be imposed on the petitioner, because those impressions are not mitigating factors within the meaning of that term in the context of sentencing. *See State v. Shortsleeves*, 580 A.2d 145, 150-51 (Me. 1990). The petitioner has not shown that he was prejudiced by the failure of his trial counsel to call these individuals as witnesses at sentencing.

With respect to the alleged failure to interview the prison guard, Kenneth Vigue, before he testified at the hearing on the petition for post-conviction review, Mr. Vigue testified that he did not have any conversations with any juror involved in the petitioner's trial. Transcript, Evidentiary Hearing on Postconviction Review, State Post-Conviction Proceeding, Vol. II at 4, 6, 7-8, 8-9. Assuming that the petitioner's trial counsel did not know that Mr. Vigue would so testify because he

had not in fact interviewed him, such foreknowledge would not have change Mr. Vigue's testimony to make it favorable to the petitioner. The petitioner was not harmed by raising this issue in his state post-conviction review proceeding, so there is no basis under *Strickland* for relief on this claim. Similarly, the petitioner does not suggest that the testimony of Teresa Belle Dawn at the hearing on his motion for a new trial would have been any more reliable if his trial counsel had interviewed her before the hearing. The fact that the motion for a new trial was withdrawn[5] after a police officer testified that Ms. Dawn, whose expected testimony had been the basis for the motion for a new trial, was unreliable as a witness, Transcript, Motion for New Trial, State Criminal Proceeding, at 67, 75, did not effect any change in the petitioner's status as a person in state custody. The petitioner's trial counsel made a reasonable decision that Ms. Dawn's testimony could not provide the petitioner with a new trial. Interviewing her before the hearing, if he did not do so, might have resulted in a decision not to go forward with the motion before the hearing was held, but it could not have resulted in a new trial for the petitioner or any other relief at the state level. The petitioner is not entitled to relief on the basis of his first allegation of ineffective assistance of counsel.

*ii. Second Ground*

The second ground asserted by the petitioner under the rubric of ineffective assistance of counsel provides, in relevant part, as follows:

> Raymond Taylor testified about the car accident "what he told me was that he had done it on purpose, that he did not fall asleep, because of something that he had done, he had tried to kill himself" yet within Taylor statement to the police on 8/12/91 Mr. Taylor had said nothing to do with "because of something that he had done," [trial counsel] knew of the need to impeach Mr. Taylors [sic] testimony for he told the court "Mr. Taylor is a question of creditbility [sic] with the jury, I will deal with that, I will deal

[5] Contrary to the petitioner's representation, the motion for a new trial was withdrawn on the record by his trial counsel. Transcript, Motion for New Trial, State Criminal Proceeding, at 75. The petitioner was asked by the presiding judge to confirm that he understood that the motion was being withdrawn and agreed with the withdrawal of the motion. *Id.* at 76-77. At no time did the petitioner have to make a "*pro se* motion to withdraw the motion" for a new trial.

> with that." Yet [trial counsel] never followed up on this. [Trial counsel] never informed the jury of Mr. Taylors [sic] extensive criminal record or of his prior statement.
>
> Maryann (Kitty) Everett gave testimony that was inconsistent to her handwritten statement. Because [trial counsel] failed to use her handwritten signed statement evidence/testimony was not allowed to be provided to the jury which would have raised reasonable doubt. Evidence that her own brother, (Sammy Everett), the victims [sic] boyfriend, said he was going to kill her, made the very night the victim turned up missing.
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> When Sammy Everett testify [sic] he stated that he had sex with the victim just prior to when I was to have had sex with her. . . . If the jury would have known of Sammy [sic] incriminating statements to his sister with this other evidence along with his lie's [sic] upon the stand that contridicted [sic] his pervious [sic] statements reasonable doubt could have been given.
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> * * *
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> Lisa Hunt gave testimony that was inconsistant [sic] to the many statements she gave, in fact, Lisa Hunt who was the petitioner's live in girl friend gave so many statements that even these impeached each other yet trial counsel failed to impeach her testimony with her prior statement or her criminal record.

Petition at 4-5. The post-conviction review court addressed these claims as follows:

> Fleming asserts several other inadequacies of [his trial counsel's] trial strategy, specifically his failure to investigate an alternative suspect theory, his failure to impeach State witnesses Raymond Taylor and Lisa Hunt by revealing prior criminal convictions, and his failure to utilize the "best evidence" by using a typed police report to cross-examine Kitty Everett instead of her handwritten statements. Fleming has not shown that any of these omissions were "manifestly unreasonable" or "resulted in a loss of a substantial ground of defense." *Pierce*, 463 A.2d at 759-60. He has not demonstrated the existence of an alternative suspect theory, which would render [his trial counsel's] performance manifestly unreasonable. Likewise, Fleming has not established that Raymond Taylor or Lisa Hunt have prior criminal convictions. Finally, [trial counsel's] use of a typed police report to cross-examine Kitty Everett is a minor decision, which was certainly not manifestly unreasonable, and did not result in any loss of a substantial ground of defense.

Amended Decision and Judgment, State Post-Conviction Proceeding, at 5-6. The petitioner's failure to identify or include in his submissions to this court any prior statements of Lisa Hunt or any evidence concerning her possible criminal record means that this court cannot consider his allegations

concerning his trial counsel's cross-examination of her. Similarly, the petitioner has failed to provide this court with any evidence of prior inconsistent statements by Sammy Everett or other evidence that could reasonably be interpreted to demonstrate that Everett lied while testifying.

The petitioner's statement that Mr. Everett "said he was going to kill her, made the very night the victim turned up missing," Petition at 4, is an apparent reference to a handwritten statement signed "Kitty Ann" which reports that "Sam called me around 3:00-3:30 a.m. ask me where is Lisa . . . . [he said] I've been down to see the devil . . . I have to worship, I have to kill." Handwritten Statement with heading "Exhibit D" included in materials filed by defendant, at [2]. First, this statement does *not* say that Mr. Everett "said he was going to kill" Lisa Garland. More important, the statement is hearsay and would not have been admissible, either through Ms. Everett's testimony on cross-examination or if the handwritten statement had been offered as an exhibit. The petitioner's trial counsel did not make an error so serious as to deprive the petitioner of a fair trial by failing to refer to this statement during his cross-examination of Ms. Everett or by failing to offer the statement as an exhibit. Beyond this portion of Ms. Everett's prior handwritten statement, the petitioner does not specify how any of her trial testimony was inconsistent with any prior statement she may have made, and this lack of specificity prevents this court from addressing this claim any further.

With respect to Raymond Taylor, the petitioner has provided a copy of a criminal record showing several felony convictions, and a copy of a three-page, typed, single-spaced Bangor Police Department supplemental report setting forth, *inter alia*, what Taylor told two police detectives on August 12, 1991. The document is not signed by Taylor and cannot be properly characterized as Taylor's statement. The petitioner apparently contends that Taylor's remarks as reported by the police are inconsistent with his trial testimony because the police report does not include the assertion that the petitioner said that he had tried to kill himself because of something he had done. Petition at 4.

Taylor's initial omission of the petitioner's statement of the reason why he tried to kill himself is not inconsistent with his later testimony to that effect. In any event, Taylor was unable to identify the petitioner at trial, Transcript, Trial Proceedings, State Criminal Proceeding, Vol. IV, at 111, and the petitioner's trial counsel established on cross-examination that Taylor more than likely had been smoking pot at the time of the conversation with the petitioner about which Taylor was testifying, *id.* at 117. The petitioner's attorney may well have chosen not to cross-examine Taylor about his criminal record or his failure to include all of the petitioner's statement to him when he talked with the police in order to avoid emphasizing Taylor's testimony before the jury. "To avoid the shoals of ineffective assistance, an attorney's judgment need not necessarily be right, so long as it is reasonable." *United States v. McGill*, 11 F.3d 223, 227 (1st Cir. 1993). Here, trial counsel appears to have made "an unarguably reasonable choice," *id*., as a tactical matter, not to pursue Taylor further. The state provided extensive evidence other than Taylor's brief testimony from which a reasonable jury could have concluded beyond a reasonable doubt that the petitioner had killed Garland. The post-conviction review court did not err under the section 2254 standard in its treatment of this claim. Under these circumstances, the petitioner is not entitled to relief on the basis of his attorney's cross-examination of Taylor.

*iii. Third Ground*

The petitioner's third basis for contending that his trial counsel provided constitutionally deficient assistance is presented as follows:

> From the very beginning I wanted to testify. This was suppose [sic] to be a bifurcated trial, first to establish my guilt then to establish my criminal responsibility. I wanted to testify during the first part to be able to explan [sic] the events of the night in question and the state's alleged evidence against me. Trial counsel would not allow me to do this, making threats to me that if I were to testify evidence would be allowed in that would be very damaging. [Trial counsel] insisted that I could not testify in the first part but must wait untill [sic] the second part of the trial where he was counting on

> me to testify. I did not learn untill [sic] I received the trial transcript that the evidence was a tape made by Miss Canney. The court had granted a motion in limine which could only be overcome by me taking the stand. This is strong evidence that [trial counsel] lied on the stand at the evidentiary hearing. After I was found guilty [trial counsel] convinced me that the second part of the trial was useless to go through with. [Trial counsel] instructed me on how to reply to the questions, that he explaned [sic] to me, that the judge was going to ask me, that had to do with my right to testify, etc.
>
> * * *
>
> I assert to this honorable Court that had I been allowed to testify as I wished there would not have existed any evidence that I had murdered this young woman.

Petition at 7-8. The last sentence of this argument represents, at best, wishful thinking. A jury might have chosen to disregard other evidence of the petitioner's guilt had he testified, but his testimony would not have caused any of that evidence to cease to exist.

The post-conviction review court addressed this claim as follows:

> Fleming also contends that [his trial counsel] refused to allow him to assist in his defense and convinced him not to testify at trial. Fleming offers no details or evidence, other than his own testimony at the post conviction hearing, of [his trial counsel's] refusal to allow Fleming to participate in his defense and does not explain how any such refusal, if any existed, prejudiced Fleming's case. The trial transcript reveals that Justice Mead thoroughly informed Fleming about his right to testify and the ramifications of his decision. Fleming responded that he understood his rights and declined to testify. Fleming's assertions in hindsight that [his trial counsel] prevented Fleming from testifying and participating at trial are not supported by any evidence in the record.

Amended Decision and Judgment, State Post-Conviction Proceeding, at 6-7. The petitioner contends that "within the evidentiary hearing trial transcript on page 28, lines 8-16 [trial counsel] admitted to making me do what he wanted." Explanation of Exhibits and Clarification at 6. Trial counsel said nothing of the sort. He did say, with respect to a particular jury instruction,

> I think it would be fair to say that . . . any discussion that we would have had I would have given him the full opportunity to speak, and he and I would have made a decision on it pretty much together. But, of course, I — I realize that I'm the attorney in the case, and I have to give my opinion, and

> sometimes I give it very strongly to the client. Again, it's just a tactical decision made by the attorney in the case.

Transcript, Evidentiary Hearing on Postconviction Review, State Post-Conviction Proceeding, Vol. I at 28. This testimony provides no support for the petitioner on this claim.

The post-conviction review court's factual determination on this issue was not unreasonable. *See* 28 U.S.C. § 2254(e)(1) (factual findings of state court presumed to be correct). *See generally Familia-Consoro v. United States*, 160 F.3d 761, 765 (1st Cir. 1998) (discussing statutory presumption in context of claim of ineffective assistance of counsel). The petitioner has added nothing in his submission to this court to the evidence that was presented to the state court on this claim. "Unaccompanied by coercion, legal advice concerning exercise of the right to testify infringes no right, but simply discharges defense counsel's ethical responsibility to the accused." *Lema v. United States*, 987 F.2d 48, 52 (1st Cir. 1993) (citations omitted).

> The difficult line courts must draw between earnest counseling and overt coercion is guided by several considerations, including: (1) whether the defendant knew about his constitutional right to testify, and if not, whether he was informed by counsel; (2) the competence and soundness of defense counsel's tactical advice, *i.e.*, whether counsel presents the defendant with sufficient information to permit a "meaningful" voluntary waiver of the right to testify; and (3) any intimidation or threatened retaliation by counsel relating to the defendant's testimonial decision.

*Id*. at 52-53 (citations omitted). Here, the petitioner offers no evidence that his trial counsel intimidated him or threatened retaliation if he testified. The petitioner alleges that his attorney made "threats . . . that if I were to testify evidence would be allowed in that would be very damaging," Petition at 8, but such statements are not threats at all; they merely represent truthfully what could happen if the petitioner were to testify. The petitioner himself stated at trial that he understood that he had the right to testify, Transcript, Trial Proceedings, State Criminal Proceeding, Vol. IX at 50-51, and he has demonstrated no reason why he should not be bound by that statement. For all that appears in

the record, the petitioner acceded to his attorney's tactical advice that he not testify. There is no evidence of coercion. The state post-conviction court's ruling on this issue does not entitle the petitioner to relief under section 2254.

*iv. Fourth Ground*

The remaining grounds for relief pressed by the petitioner do not implicate his Sixth Amendment right to counsel. The next properly exhausted claim involves the denial of his pre-trial motion for a change of venue. He presents this claim as follows:

> Every day in the T.V. news and in the Bangor newspaper the defendants [sic] complete prior criminal record was stated in detail. The victim's [sic] from prior criminal conviction and other's [sic] who once knew the defendant were continuially [sic] in the news.
>
> The victim lived acrossed [sic] the street from the courthouse, a teenage dance club (the Roxy) was at the end of the street the courthouse and the victim [sic] apartment was on was caused to be closed because of the defendants [sic] going to this club the night the victim was alleged to have turned up missing. The store that the victim worked at less then [sic] 100 feet from the Club Roxy became involved along with all who were working there at the time. Even the testimony of the victims [sic] brother Mr. Alan Garland was influanced [sic] by the news coverage of the trial. When he was asked question "Do you know how the tape plays a part in this case?," answer "yes" "I learned it from the newspaper."
>
> If a change of venue had been granted the importance of the evidence would not have become known to the witnesses and their testimony would not have become tainted against the defendant.
>
> The failure to allow for a change of venue was an abuse of discretion by the court and caused the defendant to be denied a fair trial. For this reason alone at the least a [sic] evidentiary hearing should be allowed to establish a record for the purpose of appeal.

Petition at 14. The petitioner's argument reflects a fundamental misunderstanding of the purpose of a change of venue in a criminal proceeding. A change of venue is available under circumstances in

which potential jurors might have formed an opinion before trial which cannot be impartial. *Irvin v. Dowd*, 366 U.S. 717, 722 (1961). It is not available because witnesses might have been influenced by pre-trial publicity; cross-examination is available to bring out any such bias.

In his Explanation of Exhibits and Clarification, the petitioner does argue that

> [a] number of jurors, when pressed for information based on more innocuous responses, finally divulged that they were aware of my criminal history and prior record. Considering the extensive pre-trial publicity in this case, which is part of the record, it can be seen that this pool of jurors could not yield a fair and impartial panel. The trial should have been moved to a location where a fair panel could have been picked.

Explanation of Exhibits and Clarification at 10-11 (citations to transcript omitted). The clearly established applicable federal law provides that "[i]t is not required . . . that the jurors be totally ignorant of the facts and issues involved." *Irvin*, 366 U.S. at 722.

> To hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard. It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court.

*Id*. at 723. Here, the petitioner posits an even more impossible standard: mere knowledge that the defendant has a criminal record disqualifies a juror. That is clearly not the applicable federal legal standard. Of the trial transcript pages cited by the petitioner in support of this argument, those in Volume II have nothing to do with jury selection. The potential juror involved in the citation to Volume I page 177 does not state that she was aware that the petitioner had a criminal record. Each of the potential jurors involved in the petitioner's remaining citations to Volume I was placed by the trial judge in "category A," a group of potential jurors who were aware that the petitioner had a criminal record. Every potential juror in this group was excused. Transcript of Proceedings, State Criminal Proceeding, Volume I at 232. The petitioner's trial could not have been affected by knowledge of his criminal record by any juror.

The petitioner has made no showing that a "pattern of deep and bitter prejudice" against him permeated the community from which his jury was drawn, *Irvin*, 366 U.S. at 727, and accordingly he cannot demonstrate that the state court's decision was contrary to or unreasonably applied clearly established Supreme Court precedent. The petitioner is not entitled to relief under section 2254 on this claim.

*v. Fifth Claim*

The petitioner's final claim is that the evidence presented at trial was insufficient to support his conviction. He devotes considerable time and effort to presenting his view of the evidence. Petition at 15-17; Explanation of Exhibits and Clarification at 9-10. When this issue is raised in federal court in a habeas proceeding, "the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979) (emphasis in original). The Law Court found this claim to be "without merit," *State v. Fleming*, 698 A.2d at 509, and my review of the petitioner's arguments and the evidence produced at trial confirms that the Law Court's conclusion is not contrary to *Jackson*. To the extent that the petitioner means to challenge the factual conclusions drawn by the jury, he has not overcome the presumption of correctness established by 28 U.S.C. § 2254(e)(1). He is not entitled to relief on this ground.[6]

**B. The Motion Regarding Access**

In a document entitled Motion Requesting Court Order to Allow Petitioner Unobstructed Access to the Court ("Motion") (Docket No. 3), the petitioner requests "a court order which would

[6] The petitioner contends for the first time in his reply memorandum that he was somehow denied the right to confront the witnesses against him, in violation of the Fourteenth Amendment, by the failure of his attorney to cross-examine certain witnesses concerning inconsistent prior statements. Reply at 9. Such inaction by counsel does not implicate the right to confrontation established by the Sixth Amendment to the United States Constitution, but in any event this court will not consider issues raised for the first time in a reply memorandum. *In re One Bancorp Sec. Litig.*, 134 F.R.D. 4, 10 n.5 (D. Me. 1991).

allow to me the ability to reply to the states [sic] response to my habeas corpus." Motion at 5. He complains that (i) between April 8, 1993 and March 21, 1995, "[a]ll phone calls were equipped with recording devise's [sic] yet no warning, or notice, was posted or given to me;" (ii) during the same period, "[n]o contact visits with attorneys was allowed and the phones within the visiting booths were also equipped with recording devise's [sic] and again no warning or notice was posted or given;" (iii) during the same period, "[d]uring attorney visits I was not allowed to bring note taking material . . . with me, I was not allowed to bring legal documents with me, I was not allow [sic] to receive or give legal documents during visits;" (iv) after January 1, 2001, "[b]ecause I had over the 4 inch rule concerning the limit on legal documents allowed within my cell I was made to place 12 packages of legal documents into my personal property. This took me approximately 3 months to be able to accomplish;" (v) on or about August 8, 2001 he "wrote to the M.C.L.U. to file a complaint against the Dept. of Correction," the MCLU began an investigation, and on November 8, 2001 two prison guards, in retaliation for the complaint, removed all legal documents and paper work from his cell; (vi) when his legal documents were returned on November 9, 2001 two important packages approximately 6 inches thick were missing; (vii) he has since been "hassle [sic] and provoked" by the same two officers "day after day;" (viii) no one in the prison chain of command will respond to his complaints; and (ix) he has "no faith that [his] legal documents are not being copied, read, thrown away, or destroy [sic] by vengeful prison official [sic] and guards." Motion at 1-2, 5.

The respondent observes that the petitioner did not raise this issue in this direct appeal, did not "follow[] through on his allegation of a similar nature in his state post-conviction review proceeding," and has not filed an action challenging these procedures in state court. Respondent's Response to Petitioner's Motion Requesting Court Order to Allow Unobstructed Access to the Court ("Response") (Docket No. 13) at [1]. He also represents that, in the new state prison to which the petitioner was

moved, the limit on legal documents in a cell has been increased to 12 inches and the frequency of changes has been increased. *Id*. at [2]. He observes, *id.*, and I agree, that the petitioner was able to file an extensive reply to the objection to his petition, after being granted an extension of time in which to do so, Endorsement, Docket No. 19. The petitioner does not mention in his reply any difficulty in completing that document as he wished to do resulting from any of the actions alleged in his initial motion. To the extent that the motion was intended to provide relief to the petitioner for the purpose of preparing a reply to the respondent's opposition to his petition, it is now moot. To the extent that the motion seeks prospective relief for some other purpose, no showing of need has been made. In any event, the type of complaints set forth by the motion is more appropriately brought to this court in action under 42 U.S.C. § 1983, because it deals with the conditions of his confinement rather than the fact of his custody.

The motion is denied.

**III. Conclusion**

For the foregoing reasons, the petitioner's motion for unobstructed access to the court is **DENIED**. I also recommend that the petition for a writ of habeas corpus be **DISMISSED** without a hearing.

***NOTICE***

***A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.***

***Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.***

Dated this 18th day of June, 2002.

David M. Cohen
United States Magistrate Judge

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|---|---|
| DAVID GORDON FLEMING<br>plaintiff | DAVID GORDON FLEMING<br>[COR LD NTC] [PRO SE]<br>807 CUSHING ROAD<br>UNIT 300<br>WARREN, ME 04864-4604 |
| v. | |
| CORRECTIONS, ME WARD<br>defendant | DONALD W. MACOMBER, ESQ.<br>[COR LD NTC]<br>ASSISTANT ATTORNEY GENERAL<br>STATE HOUSE STATION 6<br>AUGUSTA, ME 04333-0006<br>626-8800 |